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NO. 86-1223

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

JOHN J. POTTS,
Respondent

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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March 3, 1987

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SUPPLEMENTAL ARGUMENT

THE JUDGMENT BELOW DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondent contends that the Court is without the jurisdiction to review this case because the judgment below rests on an adequate and independent state ground. This claim is meritless.

A state court decision is presumed to be based on federal grounds and, thus, within this Court's jurisdiction, if the "state court decision fairly appears to rest primarily on federal law," or is "interwoven with the federal law," and "the adequacy and independence of any possible state ground is not clear from the face of the opinion." Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).[1] Further, where a state court intends to use federal precedent "only for the purposes of guidance," it is free to make this clear by a "plain statement" in its opinion. Id. Applying this controlling analysis, there is no bar to this Court's review of the critical Fourth Amendment issue here presented.

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1. The Michigan v. Long rule has been consistently applied to determine if an adequate and independent state ground exists. See New York v. Class, 106 S.Ct. 2633, 2638 (1985); Ohio v. Johnson, 467 U.S. 493, 497 n.7 (1984).

Suppression was ordered instantly because of technical non-compliance with one aspect of Pa.R.Crim.P. 2007, Pennsylvania's "knock-and-announce" rule. Specifically, officers executing a search warrant declined, because of this case's exigent circumstances, to await a response before entering respondent's residence. See Pa. R.Crim.P. 2007(b). In subsequently reviewing this case the Pennsylvania Superior Court stated that Rule 2007 is "a codification of the Fourth Amendment and Article 1, Section 8 of the Pennsylvania Constitution..." Petition at 5B.

This statement, although erroneous, establishes this Court's jurisdiction since the decision was at least "interwoven with" federal law and did not otherwise demonstrate the existence of an independent state ground, as by a "plain statement" of the type contemplated in Michigan v. Long.

Even more significantly, however, the Superior Court was simply wrong in stating that Rule 2007 has even a partial state constitutional basis. The Pennsylvania Supreme Court when promulgating that rule pursuant to its supervisory powers, exclusively referenced Commonwealth v. DeMichel, 442 Pa. 553, 277 A.2d 159 (1971), with respect to its adoption of paragraph (b). Pa. R.Crim.P. 2007, Comment. Commonwealth v. DeMichel, relied entirely upon the Fourth Amendment of the United States Constitution. In no respect did it rest on a state constitutional basis. Id., 442 Pa. at 560-563.[2]

Thus, while this Court has specifically stated that it will not examine state

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2. Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968), pertinent to the Supreme Court's adoption of paragraph (c) of Rule 2007, likewise rested entirely on the Fourth Amendment. Pa.R.Crim.P. 2007, Comment.

law to determine a state court decision's basis, see Michigan v. Long, 463 U.S. at 1040, even such an examination undermines respondent's position. What respondent seeks to do is to avail himself of an intermediate appellate court's stated alternative reliance on federal and state constitutional grounds, although the latter ground is without basis in the controlling Pennsylvania law. Michigan v. Long makes clear that the Court's jurisdiction cannot thus be defeated, and that this case can properly and appropriately be reviewed by this Court.

RESPONDENT'S PROXIMITY TO READILY DISPOSABLE DRUGS AND A COMMON DRUG DISPOSAL SITE WERE EXIGENT CIRCUMSTANCES, JUSTIFYING IMMEDIATE POLICE ENTRY TO EXECUTE A WARRANT.

Respondent further erroneously contends that, because he was not afforded an opportunity to dispose of the illegal drugs

which he possessed, there were no exigent circumstances justifying immediate police entry. In so doing he fallaciously assumes that the police may rely only upon exigent circumstances that arise after knocking and announcing, or which become apparent by a suspect's physical movements.

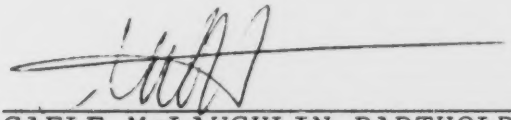
The Constitution does not so artifically and illogically limit the information upon which police may rely. The suppression court here found that the police, based on years of experience with suspects in drug searches, reasonably concluded that an immediate entry was necessary to avoid the attempted destruction of the drugs sought. There is no constitutional mandate that police must ignore such information and experience, especially where, as here, the police also know that the suspect is close to the drugs and a drug-disposal site. Such knowledge and information constitutes

an exigency -- just as do movement and sounds from within a residence indicating that contraband is being destroyed while the police, having knocked and announced, are patiently waiting. For respondent to argue, as he does, that no exigency exists turns both common sense and the Fourth Amendment on their heads.

CONCLUSION

For the foregoing additional reasons, it is respectfully requested that a Writ of Certiorai issue to review the decision belcw.

Respectfully submitted,



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